IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.1341 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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AMINABIBI MUSTUFA ABDULRAHEMAN - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
THROUGH JAIL for Appellant.
MRS SHILPA R SHAH for Appellant.
MR KT DAVE, APP for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 22/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated December 4, 1999 rendered by the learned Special Judge, Bharuch, in Special N.D.P.S. Case No.7 of 1997 by which the appellant is convicted under Section

22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short) and sentenced to suffer R.I. for ten years and fine of Rs.1 Lakh, in default S.I. for two years.

2. The facts emerging from the record of the case are as under:

In May 1997, Mr.Suraj Vishandas Tehalramani was discharging duties as Police Inspector, Narcotic Cell, C.I.D. Crime, State of Gujarat, Ahmedabad. Two days prior to May 13, 1997, he had deputed Head Constable Harjitsinh at Ankleshwar to prevent commission of offences under the Act. On May 13, 1997, Mr.Tehalramani in the company of Head Constable Hirabhai Kapadia, Head Constable R.B.Thaker, Head Constable Viththalbhai Pandu; Head Constable M.K.Katara; Woman Constable Ms.Ramilaben, and personnel of S.R.P., left his office situated in Ahmedabad and went to Ankleshwar. After reaching Ankleshwar, first of all, Mr.Tehalramani visited Ankleshwar Railway Station where Head Constable Harjitsinh Parmar presented himself before Mr.Tehalramani with his informant, and informed Mr.Tehalramani that Ms.Aminabibi wife of Mustufa Abdul Rehman residing at Khatkivad, Ankleshwar, was dealing in *charas* and *ganja.*

On receipt of the information from Head Constable Harjitsinh Parmar, Mr.Tehalramani reduced the same into writing by posting an entry into *Batmi* Register, i.e. Register wherein the information relating to commission of offences punishable under the Act is entered. He made report to his immediate official superior and sent the report through Head Constable Viththalbhai. After reducing the information received by him into writing, Mr.Tehalramani went to P.W.D. Guest House, Ankleshwar. There he summoned two witnesses and ascertained their wishes whether they were inclined to act as panch-witnesses. As the persons summoned expressed their desire to act as panch-witnesses, Mr.Tehalramani conveyed to them the information, which was received by him from Head Constable Harjitsinh Parmar. The primary panchnama was drawn at P.W.D. Guest House, Ankleshwar, between 18.15 hours and 18.30 hours. Thereafter, Mr.Tehalramani in the company of members of the raiding party went to Khatkivad in a government vehicle. The government vehicle was halted near dispensary of Dr.Saiyed. Thereafter, Mr.Tehalramani called out name of Ms.Aminabibi as a result of which, one woman came out of the house. She was interrogated by Mr.Tehalramani and on being asked, the woman stated that her name was Ms.Aminabibi, wife of Mustufa Abdul Rehman, (i.e. the appellant). PI

Mr.Tehalramani introduced himself to the appellant as well as Woman Constable and informed the appellant that an information was received that she was dealing in *charas* and *ganja* and, therefore, it was necessary to search her house. Before effecting search of the house of the appellant, Mr.Tehalramani offered the appellant to be searched in presence of a magistrate or a gazetted officer, but the said offer was declined by the appellant. Thereupon, the house belonging to the appellant was searched, which resulted into find of 200 Grams of *charas* and 500 Grams of *ganja* from a bag, which was hung on wall. Mr.Tehalramani demanded from the appellant pass or permit authorising her to possess *ganja* and/or *charas,* but none could be produced by the appellant. From the quantity of *ganja* found, 30 Grams of sample was drawn and sealed as required by law whereas from the quantity of *charas* found, sample of 10 Grams was drawn and sealed as required by law. Mr.Tehalramani asked the appellant as to who was in possession of House No.4027. Thereupon, the appellant produced ration card, which was issued in the name of her husband, i.e. Mustufa Abdul Rehman. The person of the appellant was also searched by Woman Police Constable Ramilaben, but nothing incriminating was found. The appellant was served with seizure memo and arrested. The second part of the

panchnama was completed between 18.45 hours and 19.45 hours. The appellant was thereafter brought to P.W.D., Guest House, where her statement was recorded. Necessary form was filled up for sending the samples to Forensic Science Laboratory ("F.S.L." for short) for analysis. Similarly, *Chehra Nishan Form* (identification marks) was filled in. Mr.Tehalramani lodged his complaint. Mr.Tehalramani forwarded his complaint, muddamal, other necessary documents etc. with the appellant to Ankleshwar Police Station for registration of offences. On the basis of complaint of Mr.Tehalramani, offences were registered against the appellant. Mr.Tehalramani also informed the Deputy Superintendent of Police, State Narcotic Cell, Ahmedabad, about the raid having been carried out at the residence of the appellant. *Muddamal* seized were sent to F.S.L. for analysis. Initially, the complaint of Mr.Tehalramani was investigated into by Mr.L.L.Dixit, who was then Police Sub Inspector of Ankleshwar Police Station. Mr.Dixit recorded statements of those persons, who were found to be conversant with the facts of the case. He secured the evidence from the Chief Officer, Ankleshwar Municipality, indicating that House No.4027, which was raided, belonged to the appellant. He also made report to the learned Judicial Magistrate First Class, Ankleshwar, about the seizure of offending

substance from the house of the appellant. When the investigation of the case was in progress, Mr.Dixit came to be transferred to G.I.D.C. Police Station. Therefore, further investigation into the case was made by PSI Mr.Kher. The report of the analysis indicated that the substances seized from the possession of the appellant were *charas* and *ganja* respectively within the meaning of the Act. On completion of the investigation, PSI Mr.Kher submitted charge-sheet in the Court of the learned Special Judge, Bharuch, on the basis of which Special N.D.P.S. Case No.7 of 1997 was registered against the appellant.

3. The learned Special Judge framed charge against the appellant at Exh.3 for commission of offences punishable under Sections 20(b) and 22 of the Act. Before commencement of the trial, the prosecution submitted an application at Exh.3 and requested the learned Special Judge to amend the charge by stating that at about 19.00 hours on May 13, 1997, *charas* weighing 200 Grams and *ganja* weighing 500 Grams was found without pass or permit from House No.4028 situated in Ward No.5, Ankleshwar, which was owned by and in possession of the appellant and, therefore, the appellant had committed offences punishable under Sections 20(b) and 22 of the

Act. The said application was granted by the learned Special Judge and accordingly, the charge, which was framed at Exh.3, was amended. The charge was read over and explained to the appellant, who pleaded not guilty to same and claimed to be tried.

4. The prosecution, therefore, examined: (1) panch Dharmeshkumar Kamabhai Chavda as P.W.-1 at Exh.7; (2) panch Dilavarsinh Mustufa Divan as P.W.-2 at Exh.17; (3) Head Constable Viththaldas Badaji Pandav as P.W.-3 at Exh.18; (4) Head Constable Rajendraprasad Bhagvatprasad Thaker as P.W.-4 at Exh.21; (5) PSO Ukkadbhai Kalabhai as P.W.-5 at Exh.22; (6) PI Suraj Vishandas Tehalramani as P.W.-6 at Exh.26; (7) neighbour of the appellant, i.e. Gulam Ahmed Ismail as P.W.-7 at Exh.38; (8) Harshadbhai Jivandas Sikaligar as P.W.-8 at Exh.41; (9) Tax Superintendent of Ankleshwar Nagar Palika, i.e. Navneet Chimanlal as P.W.-9 at Exh.43; (10) Store Keeper of Ankleshwar Nagar Palika Chandrakant Ishwarlal Marfatiya as P.W.-10 at Exh.46; (11) Crime Writer Head Nareshkumar Dhulabhai as P.W.-11 at Exh.48; (12) Head Constable Zinabhai Bhagabhai as P.W.-12 at Exh.50; (13) Mohmed Mustufa Mustufa Ansari as P.W.-13 at Exh.54; (14) PSI Mr.Lakhandevsinh L. Dixit, as P.W.-14 at Exh.55; and, (15) Investigating Officer, i.e. PSI Pravinsinh

Natwarsinh Kher as P.W.-15 at Exh.59, to prove its case against the appellant. The prosecution also produced documentary evidence such as; xerox copy of ration card indicating that House No.4027 was in name of Mustufa Abdul Rehman Khatki at Exh.15; panchnama indicating search of House No.4027 and find of *charas* as well as *ganja* therefrom at Exh.16; copy of the report made by Mr.Tehalramani to his immediate official superior stationed at Ahmedabad as required by Section 42(2) of the Act at Exh.19; extract from station diary indicating that the offences were registered against the appellant at Exh.24; complaint lodged by PI Mr.Tehalramani at Exh.27; phone-bill issued by STD-PCO at Exh.28; resolution mentioning reasons as to why it was necessary to enter and search the house of the appellant immediately at Exh.29; memorandum prepared by Mr.Tehalramani showing that he had offered the appellant to search her house in presence of a magistrate or a gazetted officer at Exh.31; seizure memo served on the appellant at Exh.32; document indicating that the appellant was communicated grounds of her arrest at Exh.33; report made by Mr.Tehalramani to Deputy Superintendent of Police (PRC), State Narcotic Cell, Ahmedabad, under Section 57(2) of the Act at Exh.34; forwarding letter with which two *muddamals* were sent to

F.S.L. for analysis at Exh.35; entry No.48 from *Batmi* Register indicating that information received by Mr.Tehalramani was reduced into writing at Exh.37; ration card of Gulam Ahmed Munshi at Exh.39; ration card of the appellant at Exh.42; receipt indicating payment of municipal tax of building of Gulam Ahmed at Exh.45; receipt mentioning that Writer Head Constable was handed over *muddamal* at Exh.49; letter addressed by Investigating Officer to Ankleshwar Nagar Panchayat to provide particular of house which was searched, at Exh.57; extract from tax assessment register of Ankleshwar Nagar Palika, report of analysis at Exh.60; etc. in support of its case against the appellant.

5. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the appellant the circumstances appearing against her in the evidence of prosecution witnesses and recorded her further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In her further statement, the appellant claimed that she was innocent and her house was not raided at all. However, no defence evidence was adduced by her.

6. On appreciation of evidence led by the

prosecution, the learned Judge held that it was proved by the prosecution that *charas* weighing 200 Grams and *ganja* weighing 500 Grams was found from the house, which was in possession of the appellant. The learned Judge disbelieved the defence of the appellant that she was falsely implicated in the case or that her house was not searched and nothing incriminating was found. The learned Judge noticed that the case of the prosecution was that the appellant had stored *ganja/charas* in her house for sale, but no evidence was adduced by the prosecution to establish that the quantity of *ganja/charas* found from the house of the appellant was meant for sale and, therefore, no offence punishable under Section 20(b) of the Act was made out. However, the learned Judge held that commission of offence punishable under Section 22 of the Act was firmly established by the prosecution. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Section 22 of the Act and imposed sentence referred to earlier by judgment dated December 4, 1999, giving rise to instant appeal.

7. This Court has heard Ms. Shilpa R.Shah, learned counsel of the appellant, and Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a

complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The plea that House No.4028 belonging to the appellant was never searched and, therefore, the appellant should be acquitted, is devoid of merits. The case of the prosecution is that House No.4028, which was in possession of the appellant, was searched and the search had resulted into find of 200 Grams of *charas* and 500 Grams of *ganja.* It may be mentioned that at the time of search, the appellant had produced ration card relating to House No.4027, which was in the name of Mustafa Abdul Rehman Khatki of Mullavad, Ankleshwar and, therefore, it was mentioned in the panchnama of search and seizure that House No.4027 of Mustufa Abdul Rehman Khatki was searched. However, after the raid was over, necessary investigation into the case was carried out and it transpired that the appellant was in possession of House No.4028, which was searched by Mr.Tehalramani along with the members of the raiding party. This becomes evident if one peruses the document produced by the prosecution at Exh.44, which is proved by witness Navneetbhai, examined at Exh.43. There is no manner of

doubt that the appellant was in possession of the House No.4028, which belongs to her husband and the said house was in possession of the appellant at the time when it was searched. Therefore, finding recorded by the learned Judge of the trial Court that the appellant was found in possession of House No.4028 is eminently just and is hereby upheld.

9. However, on appreciation of evidence adduced by the prosecution, this Court finds that the case of Mr.Tehalramani is that he had carried *Batmi* Register from Ahmedabad to Ankleshwar and reduced the information received from Head Constable Harjitsinh Parmar by making entry in the said register at Ankleshwar Railway Station. It is relevant to notice that the Office of the State Narcotic Cell, C.I.D. Crime, State of Gujarat, is located at Ahmedabad where *Batmi* Register is being maintained and, therefore, normally, no one would be permitted to remove *Batmi* Register from precinct of the Police Station. At this stage, it would be relevant to refer to Rule 241(5) of the Gujarat Police Manual, 1975, Volume-III, which, *inter alia,* mentions that the station diary is on no account to be removed from the station house except on the order or permission of the higher authority. The same prohibition would be applicable to

Batmi Register, which is being maintained at State Narcotic Cell, C.I.D. Crime, State of Gujarat, Ahmedabad. It is not the case of Mr.Tehalramani that he had sought permission from his higher officer to remove *Batmi* Register from the Police Station and carried the same to Ankleshwar. It is relevant to notice that State Narcotic Cell comprises of several officers and those officers on duty, who receive information as contemplated by the Act, have to reduce the same into writing by posting entry in this Register. Thus, *Batmi* Register would be needed by several officers discharging duties in the State Narcotic Cell and not alone by Mr.Tehalramani. Therefore, it was not probable that Mr.Tehalramani had carried *Batmi* Register with him when he had gone to Ankleshwar on May 13, 1997.

10. At this stage, it would be relevant to refer to testimony of Mr.Tehalramani recorded at Exh.26. During the course of recording of his examination-in-chief, Mr.Tehalramani produced *Batmi* Register before the Court. The original was shown to the Court and, thereafter, true copy of Entry No.48 posted in the said Register, was produced by him at Exh.37. This Court has perused Exh.37 from the original record. It indicates that Entry No.47 was made by PI Mr.Tehalramani relating to the information

received by him from his informer that a person named Mohmmed Iqbal Yakubbhai Shaikh was selling narcotic drugs opposite Umiya Pan Parlour-Gulla situated on Ramol-Canal Road. That entry was made by him on May 7, 1997 at about 15.45 hours. Thereafter, the entry in question was made by him at Ankleshwar on May 13, 1997 at about 17.55 hours. However, back side of the page makes it clear that Entry No.49 was posted on May 22, 1997 at 16.00 hours by another officer relating to sale of narcotic drugs by one Bhavanbhai Valand near Vahanvati Mata's temple, Chandlodiya Railway Station. It means that no entry was made from May 7, 1997 to May 22, 1997 and it was possible for Mr.Tehalramani to make entry at any point of time to indicate that the information was received by him that the appellant was in possession of *charas/ganja* in her house, and that the said information was reduced into writing. What is relevant to notice is that Mr.Tehalramani in paragraph 17 of his substantive evidence before the Court has stated that on the day of incident, he had reached Ankleshwar at 7.30 P.M. If this was so, it was not possible for him to make entry at 7.55 on May 13, 1997 that he had received the information from the informer of Head Constable Harjitsinh Parmar that the appellant had stored *charas/ ganja* in her house and was in possession of the same. The statement made by PI

Mr.Tehalramani would falsify the claim of the prosecution that after search and seizure was over, panchnama incorporating find of contraband substance from the house of the appellant was drawn between 18.45 hours and 19.45 hours on May 13, 1997 because according to Mr.Tehalramani himself after reaching Ankleshwar, he had straightaway gone to Ankleshwar Railway Station where he had received the information and after reducing the same into writing, he had gone to P.W.D. Guest House, where panchas were summoned and primary part of the panchnama was drawn. If he had reached Ankleshwar at 7.30 P.M. on May 13, 1997, he would have at least taken 30 minutes in preparing preliminary panchnama at P.W.D. Guest House and, therefore, it was not possible for him to raid and search the house of the appellant and draw panchnama of seizure of contraband items between 18.45 hours and 19.45 hours. This raises a serious doubt about the prosecution case that on May 13, 1997, the house of the appellant was searched and that search had resulted into find of contraband substance as alleged by the prosecution.

11. At this stage, it would be relevant to notice the testimony of Head Constable Viththalbhai Badaji Pandav recorded at Exh.18. This witness in his examination-in-chief has stated that on May 13, 1997 he

had accompanied his PI Mr.Tehalramani as Mr.Tehalramani had decided to arrange a raid at the place near Surat. The witness has further mentioned that on May 13, 1997, they had gone in government vehicle to Bharuch from where they had gone to Ankleshwar Railway Station and at Ankleshwar Railway Station, the information was given by Head Constable Harjitsinh that the appellant had kept *charas/ganja* in her house. The witness has further mentioned that thereafter Mr.Tehalramani had prepared a report to be forwarded at Ahmedabad and that he had carried the said report at Ahmedabad and delivered the same to the Superintendent of Police, Mr.Vikas Sahay. In cross-examination, the witness has stated that on May 13, 1997, he had reached Ankleshwar Railway Station at about 5.00 P.M. and that he was summoned by Mr.Tehalramani at 6.00 P.M. and asked to deliver report at Ahmedabad. If this is true then the prosecution has not offered any explanation as to why search of the house of the appellant was immediately not carried out when the information was received by PI Mr.Tehalramani at about 5.00 P.M.

12. On overall view of the matter, this Court finds that the whole case of search and seizure of *charas* and *ganja* from the house of the appellant is suspicious and

not above-board. Therefore, reasonable doubt arising from the facts of the case will have to be accorded to the appellant.

13. Before concluding, it would necessary to mention that the learned Judge has convicted the appellant for commission of offence punishable under Section 22 of the Act. Section 22 of the Act prescribes punishment for contravention in relation to psychotropic substances. It is not the case of the prosecution that either the *charas* or the *ganja* found from the possession of the appellant was a psychotropic substance within the meaning of the Act. Therefore, the learned Judge of the trial Court was not justified in recording conviction of the appellant under Section 22 of the Act. The appropriate provisions under which the appellant could have been convicted, would be Section 20(b)(i) and Section 20(b)(ii) of the Act. However, as this Court is inclined to give benefit of doubt to the appellant, recording of conviction under wrong provision of the Act by the learned Judge of the trial Court would not make any difference.

14. For the foregoing reasons, the appeal succeeds. Judgment dated December 4, 1999 rendered by the learned

Special Judge, Bharuch, in Special N.D.P.S. Case No.7 of 1997 convicting the appellant under Section 22 of the N.D.P.S. Act, 1985 and sentencing her to R.I. for ten years and fine of Rs.1 Lakh, in default S.I. for two years, is hereby set aside. Instead, the appellant is acquitted. The respondent is directed to release the appellant from jail forthwith unless her presence in jail is needed with reference to any other case. The *muddamal* be disposed of in terms of the directions issued by the learned Judge of the trial Court in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra